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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules	)	CC Docket No. 98-141
GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License	)	CC Docket No. 98-184

JOINT COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION ADVANCED TELCOM GROUP, INC., and KMC TELECOM, INC.

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SUMMARY

The Commission approved the proposed mergers of SBC/Ameritech and Bell Atlantic/GTE subject to conditions to offset the public interest harms associated with the transactions, including a most favored nation ("MFN") requirement that was designed to lower barriers to entry and facilitate competition. These two mergers were clearly not in the public interest without the conditions proffered by the merger partners and accepted by the Commission. In its approval orders, however, the Commission assumed that SBC and Verizon would comply with the merger conditions. This assumption has now been proven false. The Joint Commenters therefore urge modification and enforcement of the conditions.

Verizon has chosen to ignore the plain language of both the Communications Act and merger order, and its concomitant obligations. Through imaginative but legally baseless interpretations of the Act and merger order, Verizon has gutted the Commission's potentially significant conditions. As KMC Telecom's experience demonstrates, Verizon is in violation of the merger order. SBC has also embarked on an unreasonable course of conduct in order to frustrate the utility of its merger conditions. Since the SBC MFN condition is limited to negotiated agreements, SBC has engaged in unnecessary arbitration to make otherwise portable agreements unavailable.

The Commission must change the incentive structure of the SBC conditions by including arbitrated agreements. Such a modification will promote the public interest by establishing greater uniformity and business certainty, and promoting faster and more efficient entry. Likewise, Verizon must be required to port each of the former entities' separate

agreements, regardless of whether they were originally arbitrated or negotiated. Since Verizon has greatly limited the utility of the merger conditions over the past year, it should be now be required to expand those conditions to achieve the original intent of the Commission's order. Since Verizon and SBC each enjoy the benefits of being region-wide behemoths, their obligations should run concurrently.

In light of the abuse of the interconnection process by Verizon and SBC, the Commission must act to create a standardized opt-in process with self-executing incentives. Such a deregulatory approach is consistent with both the stated goals of the Act and the intent of the merger conditions themselves.

In addition to making these modifications the Commission must ensure compliance with the conditions, for without implementation of the conditions these mergers unquestionably fail to meet the requisite public interest standards. The MFN conditions must be clarified, so that Verizon and SBC understand that they encompass all Communications Act requirements, including section 252(b) obligations. The Commission must either commit resources to ensure implementation consistent with the intent of the conditions, or take action to undo the mergers.

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JOINT COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
ADVANCED TELCOM GROUP, INC., and
KMC TELECOM, INC.

The Competitive Telecommunications Association ("CompTel"), Advanced Telcom Group, Inc. ("ATG") and KMC Telecom, Inc. ("KMC") (collectively the "Joint Commenters"), by their attorneys, hereby submit these comments in response to the Commission's *Public Notice* in the above-captioned proceeding.[1] The Commission approved the proposed mergers of SBC/Ameritech and Bell Atlantic/GTE[2] "subject to conditions designed to

1 *Public Notice*, Common Carrier Bureau Seeks Comment on Letters Filed by Verizon and Birch Regarding Most-Favored Nation Condition of SBC/Ameritech and Bell Atlantic/GTE Orders, DA 01-722 (March 30, 2001) ("*Public Notice*").

2 *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, Appendix C, (1999) ("*SBC Merger Order*"); *GTE Corporation, Transferor, and Bell*
. . . continued

offset the public interest harms associated with the transactions."[3] Among the conditions is a most favored nation ("MFN") requirement "designed to lower barriers to entry and to spread the use of best practices."[4] The Commission's *Public Notice* invites interested parties to comment on 1) letters submitted to the Commission by Verizon and Birch Telecom, Inc., and 2) whether there are grounds to waive or modify the relevant MFN conditions.[5] The Joint Commenters urge modification and enforcement of the conditions.

I. THE MFN CONDITIONS WERE NECESSARY TO MITIGATE THE PUBLIC INTEREST HARMS OF THE MERGERS

The mergers of SBC/Ameritech and Bell Atlantic/GTE were not in the public interest without the conditions proffered by the merger partners and accepted by the Commission.[6] Perhaps the key clauses in the merger approval orders were the Commission's statements that "[a]ssuming satisfactory compliance" by SBC, the merger conditions would be sufficient to "tip the scales" in favor of approval,[7] and that "assuming [Verizon's] ongoing compliance with these conditions, we find that the Applicants have demonstrated" that the

Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket No. 98-184, *Memorandum Opinion and Order*, 15 FCC Rcd 14032, Appendix D (2000) (*"Verizon Merger Order"*).

3 *Public Notice* at page 1.

4 *Id., citing Verizon Merger Order*, 15 FCC Rcd 14171, ¶300; *see also Verizon Merger Order* at ¶¶ 354 and 359.

5 *Public Notice* at page 2.

6 *See, e.g., Verizon Merger Order* at ¶ 246; *SBC Merger Order* at ¶4. Many in the industry still debate whether these mergers are in the public interest even with the conditions imposed by the Commission.

7 *SBC Merger Order*, at ¶5.

merger will serve the public interest.[8] While the conditions were well-intentioned and potentially useful, satisfactory compliance has not been achieved and the conditions have simply failed to offset the public interest harms. The Commission's assumptions of compliance with the merger conditions have been rebutted.

Aware that the mergers would impede and possibly eliminate competition in the local exchange, exchange access, advanced services, long distance, and Internet access service markets,[9] "increase the duration of the entrenched firms' market power"[10] and "increase the incentive and ability of the merged entity to discriminate,"[11] the Commission wisely made its approval of the mergers subject to conditions.[12] The MFN conditions could have been particularly effective given the market entry obstacle the establishment of an interconnection

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8 *Verizon Merger Order* at ¶247.

9 *See, e.g.,* Opposition of the Competitive Telecommunications Association, *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License,* CC Docket No. 98-184 ("*BA/GTE Merger Proceeding*").

10 *SBC Merger Order* at ¶5.

11 *Id.; see also Verizon Merger Order* at ¶¶3, 360.

12 *See generally, SBC Merger Order* at ¶¶4, 348 and Appendix C; *Verizon Merger Order* at ¶¶3-4, 246-247 and Appendix D.

SBC is to make available "to any requesting telecommunications carrier . . . any interconnection arrangement or UNE" in the SBC/Ameritech Service Area that was negotiated with a telecommunications carrier by an SBC/Ameritech incumbent that "at all times during the interconnection agreement negotiations was an affiliate of SBC" and "has been made available under an agreement to which SBC/Ameritech is a party." *SBC Merger Order* at Appendix C, ¶43.

Verizon shall make available "to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement)" that was voluntarily negotiated by a Bell Atlantic or GTE incumbent LEC prior to the Merger Closing Date and, "provided that no interconnection arrangement or UNE from an agreement negotiated prior the Merger Closing Date in the Bell Atlantic Area can be extended into the GTE Service Area and vice versa." *Verizon Merger Order* at Appendix D, ¶32.

agreement represents. Despite the fact that the Communications Act[13] requires "just, reasonable, and nondiscriminatory" access and interconnection[14] and ensures the availability of agreements "upon the same terms and conditions" provided to other carriers,[15] the RBOCs attempt to thwart (or at least delay) the exercise of these rights at every possible turn.

The MFN conditions could therefore have had a significant impact. They could have widened the comparative scope that determines whether the RBOC was truly providing nondiscriminatory access by regionalizing the interconnection playing field, just as the merging entities were regionalizing their own operations. The MFN conditions could also have significantly increased the utility of the equal availability language in 252(i)[16] by making interconnection agreements (or at least certain ones) available for opt-in region-wide. The number of agreements from which a competitor could choose may have increased ten-fold.

II. VERIZON AND SBC HAVE SUCCESSFULLY FRUSTRATED THE INTENT OF THE MERGER CONDITIONS

Verizon and SBC have simply not implemented the MFN conditions as intended. Verizon created obstacles to implementation and developed specious arguments in an attempt to gut the conditions that it proffered, while SBC has acted in bad faith to remove otherwise available agreements from the MFN conditions.

13 47 U.S.C. §151, *et. seq.* ("the Act").

14 *See, e.g.*, 47 U.S.C. §§251(c)(2) and (c)(3).

15 47 U.S.C. §252(i).

16 *Id.*

A. Verizon's Conduct Has Gutted the MFN Conditions

Verizon's obstreperous behavior is well-documented. In its creative "implementation" of the conditions, Verizon has challenged the clear intent of the Commission, an intent that was spelled out with precision following the Commission's prior experience with the SBC conditions. The *Verizon Merger Order* requires Verizon to make available to requesting carriers "any interconnection arrangement, UNE, or provisions of an interconnection agreement (***including an entire agreement***)" subject to §251(c) of the Act and paragraph 39 of the conditions.[17] In case the phrase "provisions of an interconnection agreement" was not clear enough, the Commission emphasized that "entire agreement[s]" were specifically covered by this condition. Verizon has chosen, however, to ignore this language and its concomitant obligations.

Verizon has taken the position that agreement terms relating to "Obligations of All Local Exchange Carriers" established by §251(b) of the Act are not subject to porting pursuant to the merger conditions.[18] This position is completely indefensible for at least two reasons. First, as noted above, the Commission specifically stated that the MFN condition applied to "entire agreement[s]."[19] Both the Commission and Verizon (in agreeing to the conditions) were well aware that interconnection agreements included §251(b) obligations.[20] Second, Verizon's claim that the MFN conditions apply solely to §251(c) obligations attempts to

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17 *Verizon Merger Order* at Appendix D, paragraph 32 (*emphasis added*).

18 *See, e.g.*, Correspondence from Jeffrey A. Masoner, Vice President-Interconnection Services, Verizon Services Corp., to Andrew M. Klein, Kelley Drye & Warren LLP, Counsel to KMC Telecom, dated October 30, 2000, at page 3, attached hereto as Exhibit 1 ("*Masoner Letter*").

19 *Verizon Merger Order* at Appendix D, paragraph 32.

20 These include such basic items as Resale, Number Portability, Dialing Parity, Access to Telephone Numbers, Operator Services and Rights-of-Way, and Reciprocal Compensation.

turn the plain meaning of both the title and first sentence of that section on its head. Section 251(c) is entitled "***ADDITIONAL OBLIGATIONS*** OF INCUMBENT LOCAL EXCHANGE CARRIERS, and begins with the phrase "***In addition*** to the duties contained in subsection [251](b), each incumbent local exchange carrier has the following duties."[21] Section 251(c) then, of course, goes on to identify these additional obligations.

Verizon is clearly attempting to unilaterally modify (and limit) the merger conditions it proffered just one year ago. Such action clearly removes the foundation upon which the Commission's approval was built.[22] The effect of this attempt, even if the Commission reiterates the meaning of the conditions in this proceeding, is precisely the result that the conditions were to address: increased costs, delayed CLEC entry and, therefore, less competition. By its actions, Verizon has essentially breached its agreement with the Commission; Verizon offered conditions, which the Commission accepted, and Verizon has now failed to adhere to those conditions. Were this a legal action, the Commission would be entitled to damages for breach of contract – as would competitors and end-users as intended third party beneficiaries.[23]

Joint Commenter KMC Telecom has experienced Verizon's unlawful behavior firsthand. In August of 2000, KMC sought to port a Bell Atlantic interconnection agreement to three different states, citing section 251 of the Act and the *Verizon Merger Order* MFN

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[21] 47 U.S.C. §251(c) *(emphasis added)*.

[22] The Commission's approval was based on an assumption of satisfactory compliance with the merger conditions. *Verizon Merger Order* at ¶247.

[23] *See, e.g., Verizon Merger Order* at ¶¶251 and 256.

conditions.[24] In each instance, KMC has had to deal with Verizon's two-pronged approach: delay and deny. Verizon delayed responding to KMC's opt-in request for the District of Columbia, for example, for over two months - perhaps using this time to devise the imaginative approach outlined above. Instead of acknowledging the opt-in and proceeding to seek approval of the agreement pursuant to section 252 of the Act as KMC had requested, Verizon replied to KMC's request with a seven page letter interposing various arguments including, *inter alia,* the "251(c) obligations only" defense as well as weak legal interpretations of certain clauses in the underlying agreement.[25] KMC's response was a suggestion that the parties file the agreement for approval while reserving all legal rights and claims.[26] After Verizon continued to delay the processing of KMC's interconnection requests, counsel for KMC sent follow-up letters to Verizon on December 1, 2000, and December 26, 2000.[27] Verizon finally filed the interconnection agreement with the District of Columbia Public Service Commission on February 26, 2001. From opt-in to filing, Verizon's overall delay totaled ***six months***.

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24 Attached hereto as Exhibit 2 is Correspondence from Andrew M. Klein, Kelley Drye & Warren LLP, Counsel to KMC Telecom, to Jennifer Van Scoter, Director, Negotiations and Policy, Verizon, dated August 18, 2000, requesting that the Verizon-Maine/Global NAPs agreement be used as the parties' interconnection agreement in Connecticut, Delaware and the District of Columbia. Upon trying to determine the cause of Verizon's delay after sending this letter, counsel to KMC was informed that Ms. Van Scoter was on extended leave but other Verizon personnel were still sending correspondence under her name.

25 The *Masoner Letter* attached hereto as Exhibit 1 has typified the Verizon response.

26 Attached hereto as Exhibit 3 is KMC's response for the District of Columbia (Correspondence from Andrew M. Klein, Kelley Drye & Warren LLP, Counsel to KMC Telecom, to Jeffrey A. Masoner, Vice President-Interconnection Services, Verizon Services Corp., dated November 17, 2000).

27 The two follow-up letters are attached hereto as Exhibit 4 (Correspondence from Andrew M. Klein, Kelley Drye & Warren LLP, Counsel to KMC Telecom, to Jeffrey A. Masoner, Vice President-Interconnection Services, Verizon Services Corp., dated December 1, 2000, and December 26, 2000).

On December 27, 2000, Deputy Chief of the Common Carrier Bureau Carol Mattey issued an advisory letter, in response to filings by Focal Communications and Verizon, that addressed the precise issues KMC and Verizon had been quarrelling over.[28] Despite the Deputy Chief's conclusion that "Verizon is incorrect in asserting that the reference to section 251(c) limits a CLEC's opt-in rights under the MFN provisions of the *Merger Conditions,*"[29] Verizon has continued to assert the same baseless claims. Verizon's "delay and deny" tactics continue unabated.

In sum, "Verizon's view (of its MFN obligations) is not consistent with the underlying purpose of the MFN provisions to facilitate the deployment of competition and to spread the use of best practices."[30] The Commission must take action to cure this problem.

B. SBC's Conduct Has Frustrated the Intent of the MFN Conditions

SBC has engaged in a similarly unreasonable course of conduct to frustrate the utility of its MFN merger condition. While not as creative as its fellow RBOC's approach, SBC's ploy is equally effective.

Since the SBC MFN condition is limited to negotiated agreements, SBC has, not surprisingly, engaged in unnecessary arbitration. Even when SBC knows it will lose every issue before a given state commission, and in fact does so, it achieves a victory relative to the merger

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[28] Correspondence from Carol Mattey, Deputy Chief of the Common Carrier Bureau, to Michael L. Shor, Swidler Berlin Shereff Friedman LLP (CC: Jeffrey Ward, Corporate Compliance Officer, Verizon), CC Docket No. 98-184, ASD File No. 00-30, dated December 27, 2000 ("*Mattey Letter*"). Both Focal and KMC, in fact, sought to port the same Bell Atlantic/Global NAPs agreement; Focal from Vermont and KMC from Maine.

[29] *Mattey Letter* at page 2.

[30] *Id.* at page 3.

conditions. That is, by arbitrating and losing, SBC removes an otherwise portable agreement from the list of qualifying agreements.

SBC has, by way of example, removed an otherwise portable agreement from the eligible list through the actions of its California subsidiary. It is the Joint Commenters' understanding that SBC/PacBell provided an interconnection agreement to WorldCom, in which all of the Appendices included terms and conditions for multiple SBC states. When SBC/PacBell refused to remove the extraneous provisions, WorldCom filed for arbitration. SBC/PacBell did not defend its actions, and instead settled the matter with the CPUC - on condition that the final interconnection agreement include a footnote indicating that the agreement was "arbitrated." Through actions such as this, SBC has successfully utilized this loophole in the conditions to frustrate the intent of the Commission and nullify an important condition designed to mitigate the merger's competitive harm.

The Commission, in fact, recognized and attempted to close this loophole in the subsequent Verizon merger review. "The Applicants revised their original proposal to allow that the most-favored nation commitments encompass in-region arbitrated agreements, provisions, and UNEs,"[31] in response to concerns expressed by "numerous commenters" that Verizon would otherwise have an incentive to be "recalcitrant in negotiations" in order to prevent the porting of terms.[32] The Commission, in accepting this condition, noted that it should "remove any

31 *Verizon Merger Order* at ¶302.

32 *Id.* at note 690. Among the comments noted by the Commission were those of Joint Commenters CompTel and ATG.

disincentive to negotiate."[33] This disincentive, however, has never been removed from the SBC merger conditions and has served to perpetuate openly anticompetitive behavior.

III. THE COMMISSION MUST ACT TO REDRESS THE COMPETITIVE HARMS OF THE VERIZON AND SBC MERGERS

A. The SBC MFN Condition Must Be Modified to Require the Porting of Arbitrated Agreements

The basic structure of the in-region MFN condition for SBC renders it incompatible with the goal it was designed to achieve - making the process of getting an interconnection agreement within the expansive SBC territory easier, quicker and cheaper. Unfortunately, by only requiring SBC to make *negotiated* agreements in any state available throughout its region, the Commission created the perverse incentive for SBC to arbitrate every agreement rather than negotiate. In fact, it has been the experience of the Joint Commenters (and CompTel's member companies) that SBC will go out of its way to arbitrate agreements simply to ensure that they are not governed by the MFN condition. Because negotiated agreements could have region-wide effect, SBC deliberately seeks to minimize the geographic applicability of its agreements by arbitrating them before the state commissions. Thus, the in-region MFN provision for SBC has had the paradoxical, but yet entirely foreseeable effect of "punishing" cooperation and "rewarding" intransigence.

The Joint Commenters propose that the Commission change the incentive structure of the current MFN condition so that negotiation and cooperation are rewarded, while intransigence is punished. In particular, the Commission should modify this condition so that it

33 *Id.* at ¶303.

includes arbitrated agreements, meaning that arbitrated agreements from any one state within the SBC region are transferable to any other state within the region. The Joint Commenters submit that this modification will promote the public interest by establishing greater uniformity and business certainty for requesting carriers within SBC's region, as well as promoting faster and more efficient entry by opting-in to previously-arbitrated agreements.

The Joint Commenters' proposal is a reasonable and legally supported construction of section 252(i)[34] that the Commission can and should adopt today. Nothing in the plain language of the statute, or the Commission's rules implementing the statute, suggests that the Act's section 252(i) MFN provision is intended to be limited to the state in which the agreement was originally approved. The statute merely states that, "[a] local exchange carrier shall make available *any* interconnection, service, or network element provided under an agreement approved under this section *to which it is a party* to *any other requesting telecommunications carrier*."[35] Construed according to its plain language, section 252(i) is consistent with an MFN condition that requires agreements arbitrated in one state be made available for use in other states in same ILEC region. Likewise, the Commission's Rule implementing Section 252(i) clearly supports the offering of arbitrated agreements on a regional basis.[36] By modifying the existing condition to require that agreements resulting from arbitrations in any SBC state be made available in any other SBC state, the Joint Commenters believe that the intent of the Commission in originally adopting this condition can finally be realized.

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34 47 U.S.C. § 252(i)

35 *Id.* (*emphasis added*).

B. The Verizon MFN Condition Must be Broadened to Require Company-Wide Portability of All Pre-Merger Agreements

When Bell Atlantic and GTE decided to merge, they did their due diligence and evaluated the benefits and detriments of the proposed combination. Had either one believed that the other's interconnection agreements were so onerous so as to create unreasonable burdens or liabilities, it could have foregone the transaction. In light of the eventual decision to combine, it would be reasonable to require Verizon adopt each of the former entities' separate agreements as its own – regardless of whether they were originally arbitrated or negotiated.

Although the Commission declined to adopt this condition in its original approval order,[37] such a condition should be adopted now. Verizon's intentional disregard of the merger conditions warrants corrective action by the Commission, and an action that promotes the benefit sought in the first instance is logically appropriate.[38] Permitting competitors access to all interconnection agreements simplifies the rules, opens up the playing field and speeds up the interconnection process. There is no downside. Bell Atlantic and GTE were on notice of each others' agreements before they merged, and Verizon would not be harmed by such a condition since each of its prior agreements should be compliant with the Act and the Commission's rules. Finally, adding agreements arbitrated pre-merger would not be punitive, since these agreements should have fairly limited term remaining.[39] Such a simplification of the MFN conditions would

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[36] 47 C.F.R. § 51.809.

[37] *Verizon Merger Order* at ¶305.

[38] The conditions were designed to "substantially reduce entry barriers to the merged entity's region." *Id.* at ¶359.

be no different than the conditions that require Verizon to "spread best practices throughout its region."[40] Since Verizon is now one entity, benefits and obligations should run concurrently.[41]

C. The Commission Must Establish Self-Enforcing Opt-in Procedures

The Commission concluded that the Verizon merger only served the public interest, convenience and necessity "given these significant and enforceable conditions."[42] Now, in light of the abuse of the interconnection process by Verizon and SBC, the Commission must act to create a standardized opt-in process with self-executing incentives. Such a deregulatory approach is consistent both with the stated goals of the Act and with the merger conditions themselves.

While a few states, such as California, have expeditious procedures for carriers to opt-in to existing agreements, most do not. Thus, while the Act may specify a 90-day time limit for approval of interconnection agreements, the reality is that the objectively simple opt-in

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39 Even agreements with limited remaining term are helpful in light of Verizon's intentional delay in negotiating, arbitrating and filing new agreements. Such a bridging maneuver would help carriers stay afloat while the next generation of agreements are being finalized.

40 *Verizon Merger Order* at ¶354. "Significantly, 'best practices,' as we use the phrase here, will be identified in full or in part by the Applicants' customers and regulators, not by Bell Atlantic and GTE." *Id.*

41 Verizon should at the very least integrate its previously separate regions in Pennsylvania and Virginia for interconnection agreement purposes, just as it committed to do for OSS interfaces (*Verizon Merger Order* at ¶361). It is simply not reasonable for competitors in these two states to negotiate, arbitrate, or opt-in to multiple Verizon agreements in the same Verizon state. This is a particularly relevant question since the Virginia Commission has recently stated that it will not hear any additional arbitrations until the 11th Amendment sovereign immunity issue is resolved. *See Petition of AT&T Communications of Virginia, Inc., et al., for Declaratory Judgment and Application for Arbitration,* VA SCC Case Nos. PUC 000261 and 000282 (Order dated November 22, 2000).

42 *Verizon Merger Order* at ¶4. Likewise, the Commission approved the SBC merger based on the assumption of "ongoing compliance." *SBC Merger Order* at ¶4.

process is consistently drawn out by ILECs. A process that should take several weeks ends up taking several months. In California, however, carriers seeking to adopt an interconnection agreement through Section 252(i) of the Act simply notify the ILEC and file an advice letter and Notice of Adoption with the CPUC.[43] Barring objections, the agreement becomes effective sixteen days later.

It is respectfully submitted that the Commission adopt a similarly expeditious process that would apply to agreements selected by carriers under either §252(i) and the merger conditions. Measures to ensure compliance, which in light of the documented abuses to date are absolutely necessary, could include financial penalties as well as other appropriate incentives.[44] A well-defined process with escalating penalties would in one simple step both eliminate the need for Commission consideration of opt-in disputes and expedite competitive entry.

D. The Merger Conditions Must Be Enforced

Unenforced conditions are worthless. In addition to making the modifications suggested herein, the Commission must ensure compliance with the conditions since the Commission had determined that without conditions the mergers were not in the public interest.[45] "[A]bsent conditions, the merger of Bell Atlantic and GTE will harm consumers of

43 The process is established pursuant to Rule 7.1 of California Public Utilities Commission Resolution ALJ 178. Anyone may protest the opt-in by identifying provisions of the Agreement that are alleged to be anti-competitive or unduly discriminatory. The protest must be made in writing and received within twenty (20) days of the date the advice letter and Notice of Adoption were filed with the CPUC. The adoption of the Agreement then becomes effective on the 16th day after the filing unless the ILEC acts to approve the request earlier or files a request for arbitration.

44 The Commission could, for example, mandate automatic one year extensions of the particular interconnection agreement to make up for lost time, and/or include compliance within the Commission's §271 public interest test. 47 U.S.C. §271(d)(3).

telecommunications services," while "the asserted public interest benefits of the proposed merger will not outweigh these public interest harms.[46] "[T]he proposed merger of [SBC and Ameritech] threatens to harm consumers of telecommunications services" and "the asserted benefits if the proposed merger, absent conditions, do not outweigh these significant harms."[47]

The Commission warned Verizon about the risks of noncompliance, stating its expectation that Verizon would "implement each of [the] conditions in full, in good faith and in a reasonable manner to ensure that all telecommunications carriers and the public are able to obtain the full benefits of these conditions."[48]

> If Bell Atlantic/GTE does not fulfill its obligation to perform each of the conditions, pursuant to our public interest mandate under the Communications Act we must take action to ensure that the merger remains beneficial to the public. We intend to utilize every available enforcement mechanism, including, if necessary, revocation of the merged firm's section 214 authority, to ensure compliance with these conditions. To this end, should the merged entity systematically fail to meet its obligations, we can and will revoke relevant licenses, or require the divestiture of Bell Atlantic/GTE into the current Bell Atlantic and GTE companies. Although such action would clearly be a last resort, it is one that would have to be taken if there is no other means for ensuring that the merger, on balance, benefits the public.[49]

Since Verizon and SBC have reneged on their proffered conditions, the Commission must step up and commit resources to ensure implementation consistent with the

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45 *Verizon Merger Order* at ¶4 and *SBC Merger Order* at ¶4.

46 *Verizon Merger Order* at ¶3.

47 *SBC Merger Order* at ¶3.

48 *Verizon Merger Order* at ¶256.

49 *Id.*

intent of the conditions. Otherwise, the Commission would be forced to take action to undo the mergers.[50]

The intent of the merger conditions was to mitigate the harms otherwise created, by making competition "more likely,"[51] not to force CLECs to divert valuable time and resources in vain attempts to enforce the conditions. The conditions, after all, were proposed by the merger applicants themselves, modified and then endorsed by the Commission.[52]

As an initial matter, the Commission must formally clarify that 251(b) obligations are included within conditions, in accordance with the *Mattey Letter* and a plain, common sense reading of 251(c). This will fulfill the original intent of one of the primary conditions upon which approval of the Verizon merger was based - that Verizon agree to port "provisions of an interconnection agreement (including an entire agreement)" across state lines.[53]

To remove another variable that is wide open to RBOC abuse, the Commission should also clarify that ***all agreements filed*** post-merger are available, whether negotiated or arbitrated. While the MFN merger condition differentiates between pre- and post-merger agreements, it does not specify how this clause is to be interpreted. Despite the fact that ten months have passed since the Verizon merger, agreements are still being filed with state

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50 In light of the Commission's conclusions as set forth in the merger orders, non-compliance with conditions deemed essential to a finding that the mergers served the public interest, convenience and necessity would enable no legally supportable conclusion other than that the mergers should not be approved.

51 *Verizon Merger Order* at ¶352.

52 *See, e.g., SBC Merger Order* at ¶¶1, 5, 354; *Verizon Merger Order* at ¶¶1, 19.

53 *Verizon Merger Order* at Appendix D, paragraph 32.

commissions that reference "Bell Atlantic" as the ILEC party.[54] Neither these agreements nor their accompanying filings indicate whether the agreements were negotiated "prior to the Merger Closing Date."[55]

Bad faith arbitration, particularly by SBC, must be eliminated. The Commission should either adopt the incentive-based modification recommended above or impose a significant and specific penalty for any such actions. Obviously, the broader the availability of arbitrated agreements, the less need there is for enforcement measures or potentially time-consuming proceedings to determine bad faith. In other words, creation of the proper incentives eliminates the need for undue Commission involvement.

In sum, Commission action to date has, unfortunately, not been sufficient to prevent the new behemoths from acting like the monopolists both the Commission and competitors feared they might. Verizon and SBC have all but ignored their merger conditions – even following explicit direction from senior Commission staff.[56] Enforcement or divestiture are the only options that remain.

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[54] On February 1, 2001, for example, Verizon filed an interconnection agreement with Level 3 Communications, LLC, in New York, which references "BA" as the ILEC throughout its text. Neither the agreement nor the filing indicate when this agreement was negotiated.

[55] *Verizon Merger Order* at Appendix D, paragraph 32.

[56] Verizon, for example, has continued to blatantly misinterpret the merger conditions despite a clear and unequivocal interpretation from Deputy Bureau Chief Carol Mattey. *Mattey Letter* at pages 2 and 3.

IV. CONCLUSION

In light of the foregoing, the Joint Commenters respectfully request that the Commission modify and clarify the Verizon and SBC merger conditions so that they may fulfill their original intent, and take action to enforce the merger conditions to prevent further disregard and abuse by Verizon and SBC.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS ASSOC.
ADVANCED TELCOM GROUP, INC.
KMC TELECOM, INC.

Dated: April 30, 2001

By: ______________________

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Exhibit 1

Jeffrey A. Masoner
Vice President-Interconnection Services

verizon

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October 30, 2000

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Washington, D.C. 20036

Re: Requested Adoption Under the FCC Merger Conditions

Dear Mr. Klein:

Verizon Washington, D.C. Inc., f/k/a Bell Atlantic-Washington, D.C., Inc. ("Verizon Washington, D.C."), has received your letter stating that, pursuant to paragraph 32 of the BA/GTE Merger Conditions ("Merger Conditions"), released by the FCC on June 16, 2000 in CC Docket No. 98-184, KMC Telecom V, Inc. ("KMC") wishes to provide services to customers in Verizon Washington, D.C.'s service territory in the District of Columbia by adopting the voluntarily negotiated terms of the Interconnection Agreement between Global NAPS, Inc. ("GNAPS") and Verizon New England Inc., f/k/a Bell Atlantic – Maine ("Verizon Maine") that was approved by the Maine Commission as an effective agreement in the State of Maine, as such agreement exists on the date hereof after giving effect to operation of law (the "Verizon Maine Terms")[1].

I understand that KMC has a copy of the Verizon Maine Terms which, in any case, are attached hereto as Appendix 1. Except with respect to Maine state-specific pricing provisions, performance measures provisions, provisions that incorporate a determination reached in an arbitration conducted in the relevant state under 47 U.S.C. Section 252, provisions that incorporate the results of negotiations with a state commission or telecommunications carrier outside of the negotiation procedures of 47 U.S.C. Section 252(a)(1), and any provisions not required by Section 251(c) of the Telecommunications Act of 1996 (the "Act") (including but not limited to any reciprocal compensation provisions,which are also excluded as state-specific pricing provisions and, in any case, are not available for adoption under the Merger Conditions) contained in the GNAPS/Verizon Maine agreement, Verizon Washington, D.C. does not oppose KMC's adoption of the Verizon Maine Terms at this time. However, please note the following with respect to KMC's adoption of the Verizon Maine Terms.

[1] These "agreements" are not agreements in the generally accepted understanding of that term. Verizon Maine was required to accept these agreements, which were required to reflect then-effective FCC rules and other applicable law.

1. By KMC's countersignature on this letter, KMC hereby represents and agrees to the following three points:

(A) KMC adopts in the service territory of Verizon Washington, D.C. the Verizon Maine Terms of the GNAPS/Verizon Maine agreement, and in applying the Verizon Maine Terms, agrees that KMC shall be substituted in place of GNAPS in the Verizon Maine Terms wherever appropriate.

(B) KMC requests that notice to KMC as may be required or permitted under the Verizon Maine Terms shall be provided as follows:

To : CT Corporation System
1025 Vermont Avenue, N.W.
Washington, D.C. 20005
Facsimile: (717) 590-9190
Phone: (717) 590-9100

(C) KMC represents and warrants that it is a certified provider of local telecommunications service in the District of Columbia, and that its adoption of the Verizon Maine Terms will only cover services in the service territory of Verizon Washington, D.C. in the District of Columbia.

2. KMC's adoption of the Verizon Maine Terms shall become effective upon the date that Verizon Washington, D.C. files this letter with the District of Columbia Commission (which Verizon Washington, D.C. will promptly do upon my receipt of a copy of this letter, countersigned by KMC as to points (A), (B) and (C) of paragraph 1 above, as well as a copy of a joint filing letter, countersigned by KMC) and remain in effect no longer than the date the GNAPS/Verizon Maine agreement terminates or expires. The GNAPS/Verizon Maine agreement is currently scheduled to expire on October 1, 2001. Thus, the Verizon Maine Terms adopted by KMC also shall terminate or expire on that date.

3. As the Verizon Maine Terms are being adopted by KMC pursuant to the Merger Conditions, Verizon Washington, D.C. does not provide the Verizon Maine Terms to KMC as either a voluntary or negotiated agreement. The filing and performance by Verizon Washington, D.C. of the Verizon Maine Terms does not in any way constitute a waiver by Verizon Washington, D.C. of any position as to the Verizon Maine Terms or a portion thereof. Nor does it constitute a waiver by Verizon Washington, D.C. of any rights and remedies it may have to seek review of the Verizon Maine Terms, or to seek review of any provisions included in these Verizon Maine Terms as a result of KMC's election pursuant to the Merger Conditions.

4. KMC's adoption of the Verizon Maine Terms pursuant to the Merger Conditions is subject to all of the provisions of such Merger Conditions. For example, state-specific pricing, state-specific performance measures, provisions that incorporate a determination